English legislation fails to "strike a fair balance between the competing public and private interests".

BOB HEPPLE

THE ADMINISTRATIVE IMPLEMENTATION OF SENTENCES

JACK Straw won a curious battle in the House of Lords in *R (Black)* v. *Secretary of State for Justice* [2009] UKHL 1, [2009] 2 W.L.R. 282. Four Law Lords agreed to allow his appeal from the Court of Appeal's decision to grant a prisoner a declaration that section 35(1) of the Criminal Justice Act 1991 was incompatible with Article 5(4) of the European Convention on Human Rights. Determinate sentence prisoners, once their parole eligibility date arrives, are not entitled by virtue of Article 5(4) to a speedy judicial decision upon the lawfulness of any further detention. The position taken by Lord Phillips, dissenting, that Article 5(4) does indeed apply, is much more satisfactory.

The respondent was sentenced to 20 years' imprisonment in 1995, with four years (consecutive) added in 1996. He became eligible for parole in June 2006, and on 2 May 2006 the Parole Board recommended his release. However, the Secretary of State rejected this recommendation and Black remains in custody. (Under the rules currently applicable, he will be released when he has served two thirds of his sentence, in June 2010.) Since the implementation of the Criminal Justice and Immigration Act 2008, the vast majority of determinate sentence prisoners are released automatically at the half way point in their sentence (and indeed often significantly sooner under the Home Detention Curfew and other discretionary schemes). Black is one of a small number of prisoners who do not qualify for half time release, because he has already reached half time, and has already been subject to an adverse decision (in his case by the Secretary of State, not the Parole Board).

Lord Brown, with whom Lord Rodger, Baroness Hale and Lord Carswell specifically agreed, held that Article 5(4) has no application at the halfway stage in the sentence. He reviewed a large number of decisions of the European Court of Human Rights, as well as the House of Lords' decisions in *R (Giles)* v. *Parole Board* [2004] 1 A.C. 1, *R (West)* v. *Parole Board* [2005] 1 W.L.R. 350 (noted [2005] C.L.J. 276), and *R (Clift)* v. *Secretary of State for the Home Department; Secretary of State for the Home Department* v. *Hindawi* [2006] UKHL 54, [2007] 1 A.C. 484 (noted [2007] C.L.J. 255). His Lordship accepted that it follows from *West* that a prisoner's recall to prison for breach of his licence conditions raises "new issues" affecting the lawfulness of his

https://doi.org/10.1017/S0008197309000531 Published online by Cambridge University Press

detention. He accepted, too, that the consequence of the Secretary of State's decision was a number of "evident incongruities" (at [79]) and that it was "indefensibly anomalous" (at [81]). But it was not contrary to Article 5(4). Although unimpressed by the Secretary of State's position, the majority decided that there was nothing intrinsically objectionable (in Convention terms, anyhow) in allowing the executive, subject to judicial review, to take early release decisions. Article 5(4) could not apply simply because it would be useful if it did.

Lord Phillips disagreed: the release regime applicable to Black contravened Article 5(4). A sentence of imprisonment is not conclusive of the lawfulness of imprisonment if the law under which it is imposed makes provision for release, either unconditionally or subject to the satisfaction of certain criteria. In the context of English sentencing law:

> it cannot be suggested that the imposition of a determinate sentence renders the detention of the defendant lawful for the full period of the sentence. It will provide the legal foundation for detention during the term of the sentence provided that other conditions, such as those governing recall of a defendant released on licence, are satisfied. The law provides, however, circumstances in which a person sentenced to a determinate sentence is entitled to be released. Article 5(4) must apply so as to enable him to seek a determination of whether those conditions are satisfied should this be in issue (at [18]).

Once a prisoner is eligible to be considered for release, there are justiciable criteria that govern the decision whether or not he or she is to be released. "In as much as s. 35(1) requires the Parole Board to make its decision first and then permits the Secretary of State to take a different decision it places the cart before the horse. This is contrary to the requirements of Article 5(4)" (at [36]).

The apparent unfairness of the law on release has resulted in a flood of cases, both at home and in the European Court of Human Rights. A problematic decision of the ECtHR is *Brown* v. *UK* (Application No 968/04) 26 October 2004, where the Court dismissed a challenge by a determinate sentence prisoner recalled to prison, saying that his recall raised "no new issues of lawfulness". Lord Brown openly wondered whether the European Court would have decided *Brown* as it did had that case followed, rather than preceded, the House of Lords' decision in *West* (see [74]). Yet their Lordships seem happy to follow the submissive role for domestic courts suggested by Lord Bingham in *R (on the application of Ullah)* v. *Special Adjudicator* [2004] UKHL 26, [2004] 2 A.C. 323: "the Convention is an international instrument, the correct interpretation of which can be authoritatively expounded only by the Strasbourg court", and a national court " should not without

https://doi.org/10.1017/S0008197309000531 Published online by Cambridge University Press

strong reason dilute or weaken the effect of the Strasbourg case law" (at [20]). But the decisions of the European Court in this field are far from consistent. Domestic courts must take a lead.

In deciding as they did, the majority concluded that several recent decisions of the Court of Appeal were wrongly decided (*R (Johnson)* v. *Secretary of State for the Home Department* [2007] 1 W.L.R. 1990, *R (O'Connell)* v. *Parole Board* [2008] 1 W.L.R. 979, *R (Black)* v. *Secretary of State for Justice* [2008] EWCA Civ 359, [2008] 3 W.L.R. 845). Lord Rodger concluded: "like Lord Brown, I find it hard to understand why [the Secretary of State] should wish to cling tenaciously to this last vestige of his power to determine when prisoners should be released, since she [*sic*] accepts that there can be no legitimate political input into the decision" (at [50]). Executive powers of detention, involving not only an assessment of the risks presented by the prisoner, but also of the likely success of the supervision plan developed by the hard-pressed probation services, merit careful judicial scrutiny. The political message is curious. The Government, whilst pushing for ever tighter guidelines on constitutionally independent sentencing judges (see clauses 104–122 of the Coroners and Justice Bill, as brought to the House of Lords in March 2009), is encouraging the administrative implementation of flexible early release and recall schemes. If as much Parliamentary time was spent on "back door" as on "front door" sentencing, the system might be a whole lot fairer and, dare I say it, "effective".

NICOLA PADFIELD

HEARSAY REFORM: THE TRAIN HITS THE BUFFERS AT STRASBOURG

FEW recent decisions of the European Court of Human Rights have put the cat among the English legal pigeons as effectively as *Al-Khawaja and Tahery* v. *UK* (Applications 26766/05 and 22228/06, 20 January 2009). And this is not surprising, since it shows that our 2003 reform of the hearsay rule – elaborated by the Law Commission and enacted as part of the Government's ongoing programme to "rebalance" criminal justice – conflicts with the rights guaranteed to defendants under Article 6 of the European Convention on Human Rights.

In its classic form, the English hearsay rule rendered inadmissible as evidence of the facts any statement from a person who had seen, heard or otherwise experienced them, other than one given by the witness in oral evidence at trial: where, of course, he would depose on oath and be subject to cross-examination. If rigidly applied, this rule could lead to miscarriages of justice in a range of cases where a key witness could

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